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No. 93-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

vs.

PFIZER INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioners, as unnamed, nonintervening class members—who have a separate action pending in state court against defendants, and who affirmatively rejected multiple opportunities to opt-out of a Rule 23(b)(3) class action settlement—have standing to appeal from a judgment approving a class settlement satisfactory to the class representatives and all other class members.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
ADDITIONAL OPINION BELOW	2
STATEMENT OF THE CASE	2
SUMMARY OF REASONS FOR DENYING THE WRIT	8
REASONS FOR DENYING THE WRIT	8
I. The Court Of Appeals For The Sixth Circuit Applied Principles Of Appellate Procedure Established By This Court And Consistently Applied By The Courts Of Appeal	8
II. The Unique And Unusual Facts Of This Case Make It Unsuitable For Review By This Court	11
III. Petitioners' "Due Process" Argument Is Meritless	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
Angus v. Shiley, Inc., 989 F.2d 142 (3rd Cir. 1993)	3
Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3rd Cir. 1993)	10
Bowling v. Pfizer, 143 F.R.D. 141	2,3,4,5,6,9,12
Brinkman v. Shiley, Inc., 732 F.Supp. 33 (M.D.Pa. 1989), *aff'd* 902 F.2d 1558 (3rd Cir. 1989)	3
Carlough v. Amchem Products, Inc., 5 F.3d 707 (3rd Cir. 1993)	10
Cohen v. Young, 127 F.2d 721 (6th Cir. 1942)	7,12
Croyden Associates v. Alleco, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied.* 113 S.Ct. 1251 (1993)	7,9,11
Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993)	9,13
Guthrie v. Evans, 815 F.2d 626, 627-28 (11th Cir. 1987)	7,11
In re Beef Industry Antitrust Litigation, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied* 452 U.S. 905 (1981)	11
In re VMS Limited Partnership Securities Litigation, 976 F.2d 362 (7th Cir. 1992)	9
Loran v. Furr's/Bishop, Inc., 988 F.2d 554 (5th Cir. 1993)	9
Marino v. Ortiz, 484 U.S. 301, 304 (1988)	8,9,12
Marshall v. Holiday Magic, Inc.,550 F.2d 1173, 1177 (9th Cir. 1977)	11
Police Officers for Equal Rights v. City of Columbus, 865 F.2d 260 (Table) (6th Cir. 1988), (unpublished, text available on LEXIS and WESTLAW)	13

Table of Authorities Continued

	Page
Sertic v. Cuyahoga Lake, Geauga and Ashtabula Counties Carpenters District Council, 459 F.2d 579 (6th Cir. 1972)	12
Shores v. Sklar, 844 F.2d 1485 (11th Cir. 1988)	9
Taylor v. Shiley, Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia), February Term, 1986, No. 2087	2,3,6,8
Thompson v. Kentucky, 827 F.2d 770 (Table) (6th Cir. 1987), (unpublished, text available on LEXIS and WESTLAW)	13
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), (appeal from denial of class action certification)	9
Walker v. City of Mesquite, 858 F.2d 1071, 1073-75 (5th Cir. 1988)	7,9,11
Weinberger v. Kendrick, 698 F.2d 61, 72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983)	11

STATUTES AND RULES

28 U.S.C. § 1291	8,12
Fed.R.Civ.P. 23	10
Fed.R.Civ.P. 23(b)(3)	3,11
Sixth Circuit Local Rule 24(c)	8,13

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents, Plaintiffs' Class Bowling, et al., oppose the Petition for a Writ of Certiorari.[1] The Court of Appeals for the Sixth Circuit dismissed petitioners' appeal upon the basis of established principles of appellate standing as set forth by this Court, and applied by the Courts of Appeal. Additionally, the facts of the instant case are so particular to this matter

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[1] Respondents have no Rule 29.1 parent companies or subsidiaries.

that this case is not suitable for review by the Supreme Court.

ADDITIONAL OPINION BELOW

The decision of the district court, from which appeal was taken, is reported at 143 F.R.D. 141 (S.D.Ohio 1992).

STATEMENT OF THE CASE

Bowling, et al. v. Pfizer Inc, et al., the litigation from which the instant petition arises, is a product liability class action which was brought on April 19, 1991 by living recipients implanted with the Bjork-Shiley Convexo/Concave Heart valve and their spouses. The Convexo/Concave Heart valve was manufactured by defendant Shiley Incorporated, a wholly-owned subsidiary of defendant Pfizer Inc. Plaintiffs' class alleges that the Convexo/Concave Heart Valve is inherently defective in that the product has a propensity to fracture. Plaintiffs' class includes approximately fifty thousand (50,000) valve recipients residing world-wide.

Petitioners are neither named parties nor intervenors to the *Bowling* litigation, but merely two valve recipients and one spouse who are class members. Petitioners filed a state court class action, *Taylor v. Shiley*, in February 1986, on behalf of Convexo/Concave Heart Valve recipients residing in Pennsylvania, only, with large (but not small) valves, who did not have pending lawsuits. (R. 143, Ex. D: Second

Amended Complaint In *Taylor v. Shiley*, at p. 34).[2] In September, 1989, more than three years after initial filing of their Pennsylvania lawsuit, plaintiffs first moved for class certification. Their motion for certification has been pending before the state court for more than four years. No class has been certified in the state court action. Neither have class counsel been appointed in the action, nor has any communication with members of that putative class ever been undertaken or ordered by the state court. No class settlement has been negotiated in *Taylor v. Shiley*. Petitioners allege that they were well situated to obtain a sizable recovery upon the behalf of the putative Pennsylvania class. This allegation is false and was determined to be "specious" by the district court. *Bowling*, 143 F.R.D. 141, 161 (S.D.Ohio 1992). Precedential case law negates the viability of any cause of action by petitioners under Pennsylvania law. *Brinkman v. Shiley Inc.*, 732 F.Supp, 33 (M.D.Pa. 1989), *aff'd* 902 F.2d 1558 (3rd Cir. 1989); *Angus v. Shiley, Inc.*, 989 F.2d 142 (3rd Cir. 1993).

On January 23, 1992, the *Bowling* case was conditionally certified as a Rule 23(b)(3) opt-out class action by the district court. (R. 48: Order Certifying The Conditional Settlement Class And Scheduling A Fairness Hearing).

In January, 1992, class counsel and counsel for defendants entered into a proposed settlement agreement. Subsequent to the issuance of appropriate no-

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[2] Citations to the record are to the district court docket numbers.

tice to the class, the proposed settlement agreement was the subject of fairness hearings before the district court on June 5, 8, 9, 1992 and July 22, 1992. In accordance with the notice provided the class, any class member who wished to participate during the hearings was permitted to do so. The Court also permitted non-class members claiming an interest in the outcome to participate, including the representatives of consumer groups. As indicated by the transcripts of proceedings (R. 202: Transcript Of Fairness Hearing; R. 207: Transcript Of Fairness Hearing; R. 208: Transcript Of Fairness Hearing; R. 224: Transcript Of Fairness Hearing; and R. 251: Transcript Of Fairness Hearing), the district court heard from more than forty different American and foreign counsel and individuals, as well as considering written communications to the Court by class members who could not be present. A multitude of individuals participated vigorously in the process. No person who desired to be heard was refused.

By electing to opt-out, class members did *not* waive their opportunity to be heard or to object to the proposed class settlement. Petitioners' assertion to the contrary is untrue. *Bowling*, 143 F.R.D. at 155-56. During a May 19, 1992 status conference, prior to the fairness hearings and prior to the date petitioners were to elect whether to opt-out, all attendees, including petitioners, were specifically informed of this by the district court. (R. 122: Civil Minutes at p. 28).

Petitioners received class notice of the *Bowling* settlement in February, 1992, and the complete text of the proposed agreement was available for their inspection. On February 26, 1992, less than one month after the proposed settlement had been reached,

petitioners provided the state court with a status report wherein petitioners advised the state court of the *Bowling* proposed settlement and indicated that petitioners were meeting with defendants regarding the terms of the settlement. (R. 255: Second Supplemental Memorandum By Defendants In Support Of Settlement, Ex. 1). Moreover, the district court granted petitioners' request for written discovery of the terms of the settlement from class counsel and defendants prior to the fairness hearings.

Petitioners were given three opportunities to opt-out of the *Bowling* settlement. Yet, petitioners each time affirmatively elected to remain within the *Bowling* settlement class. (R. 224: June 9, 1992, Transcript of Proceedings, at pps. 92-95; R. 251: July 22, 1992, Transcript of Proceedings, at p. 83).

On August 19, 1992, the District Court issued a sixty-eight page Order Finding The Proposed Settlement To Be Fair. *Bowling*, 143 F.R.D. 141. On September 10, 1992, the District Court entered its Judgment Certifying The Settlement Class And Approving The Class Settlement. (R. 255).[3]

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[3] Petitioners have mischaracterized the benefits provided by the *Bowling* settlement. The value of the settlement negotiated in *Bowling*, as approved by the district court, has been estimated to be from Two Hundred Fifteen Million ($215,000,000) Dollars to as great as Five Hundred Million ($500,000,000) Dollars. The settlement provides, in part, for research to develop diagnostic techniques to identify valve recipients who have a significant fracture risk, research to characterize or reduce the risk of valve replacement surgery, unlimited funding for payment of expenses associated with valve replacement surgery, including disability benefits, payment for medical and psychological consultations, and unlimited funding to provide compensation in the event of

On September 17, 1992, petitioners filed their notice of appeal to the Court of Appeals for the Sixth Circuit. (R. 258). Petitioners were the only class members to appeal the district court's rulings. Petitioners did not seek to intervene prior to filing a notice of appeal.[4] Petitioners' assertion that "the district court gave every indication that intervention was *not* required (Pet. at 7) is unjustifiable and unfounded.

On September 25, 1992, petitioners filed a belated motion to intervene in the district court, despite the fact that the filing of the notice of appeal had already divested the district court of jurisdiction. By memo-

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fracture. An accurate description of the settlement is set forth by the opinion of the district court at *Bowling*, 143 F.R.D. at 148-50.

[4] The position taken by petitioners in their appeal is completely contrary to that taken by their counsel in a hearing before state court Judge Lord in *Taylor v. Shiley* on December 29, 1992. Exhibit C-1 to the transcript of that hearing (R. 334) indicates that petitioners' counsel applauded the *Bowling* settlement from the standpoint of his three clients:

> [A]lthough our clients were offered the opportunity to opt [out] of the *Bowling* case, they elected to stay in the case and obtain the benefits of the *Bowling* settlement . . . One of our clients has been identified as a candidate for a re-operation, which means that her Pfizer heart valve would be removed and a new heart valve implanted. Under the *Bowling* settlement, this client could expect to receive substantial compensation and to thus be able to afford the procedure. Accordingly, the prospect of waiting many, many years for a resolution of the *Taylor* case, compared to the relief provided by a prompt implementation of the *Bowling* settlement was something that the client considered. The other client who has a working heart valve is also in a fragile state of health.

randum decision dated November 9, 1992, the district court determined that it would not decide the motion to intervene. Petitioners appealed from the district court's memorandum decision also.

On December 23, 1993, the Sixth Circuit issued two Orders. The first Order affirmed the district court's determination that it lacked jurisdiction to rule on the motion to intervene while petitioners' appeal was pending.[5] (Pet. App. at 6a). The second Order dismissed the principal appeal. Citing to *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988), the Court of Appeals held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 1a).

Petitioners then petitioned for rehearing *en banc*, relying upon *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) and an alleged inconsistency between *Cohen* and the more recent unpublished decisions of the Sixth Circuit. Respondents were asked to file a response, addressing these specific allegations, and did so.

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc*, noting that the petition had been circulated among all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hearing panel had

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[5] Petitioners have not sought certiorari as to this decision.

"further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." (Pet. App. at 3a).

SUMMARY OF REASONS FOR DENYING THE WRIT

The question presented by the petition has already been resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).

The facts underlying this petition are so particular to this matter, and unusual, that the case is not suitable for review by the Supreme Court, to wit: the nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement, in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; and petitioners have their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court.

Petitioners' argument that dismissal of their appeal violated their constitutional right to due process is meritless and based upon a misinterpretation of 28 U.S.C. Section 1291, and a misunderstanding of Rule 24(c) of the Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED PRINCIPLES OF APPELLATE PROCEDURE ESTABLISHED BY THIS COURT AND CONSISTENTLY APPLIED BY THE COURTS OF APPEAL.

The question presented by the petition has already been resolved by this Court in *Marino v. Ortiz*, 484

U.S. 301, 304 (1988). Therein, the Court specifically and conclusively held that only individuals who are parties, or those who properly become parties, may appeal a judgment. Citing to *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)(appeal from denial of class action certification), this Court also rejected the suggestion made by the Second Circuit that there could be exceptions to this rule, finding instead that a nonparty is to seek intervention for purposes of appeal.

Subsequent to *Marino*, every Court of Appeals to be presented with an appeal from a class action judgment brought by nonparty class members has ruled that such do not have standing to appeal. *Bowling v. Pfizer*, No. 92-3973 (6th Cir. 1993) (Pet. App. at 1a); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

Petitioners' argument that there is a "split" among the circuits as to the issue of a nonparty class member's standing to appeal a judgment approving a class settlement is unfounded. No Court of Appeals presented with this issue has declined to follow the holding of *Marino*.

Petitioners rely primarily upon decisions rendered prior to *Marino*. While petitioners cite to three cases decided after *Marino*, none stand for the proposition asserted by petitioners. In *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), a nonparty class member was found not to have standing to appeal a post-settlement order im-

plementing a settlement agreement. In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993), nonparty class members appealed from a denial of their motion to intervene. The appeal was dismissed by the Third Circuit upon the basis that the appeal was interlocutory in nature and not immediately appealable. Thus, the factual and procedural circumstances present in *Carlough* were far different than those of the instant petition, wherein petitioners neglected to intervene prior to appealing a final judgment approving a class settlement. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993) was a shareholders' derivative suit, not a class action, and therefore "inapposite". *Gottlieb*, 11 F.3d at 1010-11 (10th Cir. 1993). Indeed, *Bell Atlantic* itself stated that "one of the rationales offered in support of an intervention requirement cannot apply to derivative actions" because "unlike members of a class certified under Rule 23(b)(3), 'shareholders normally cannot opt out of the class and pursue their own individual action.'" *Bell Atlantic*, 2 F.3d at 1308 n.4 (citation omitted).

The supposed "split" among the circuits, argued by petitioners, is nonexistent. Subsequent to this Court's decision in *Marino*, the Courts of Appeal have uniformly held that non-party class members do not have standing to appeal from a judgment in a class action. No reason exists for this Court to grant review.

The reasoning underlying the rule that non-party class members do not have standing to appeal from a judgment in a class action is based upon sound legal and policy considerations. First, unnamed individual class members cannot represent the class absent the procedures provided for in Fed.R.Civ.P. 23, for neither plaintiffs nor counsel can represent a class ab-

sent a district court's finding on issues such as adequacy of representation. Second, class members who disagree with the course of a class action have adequate procedures available to them, such as collateral attack, through which they can protect their interests. Procedures applicable include intervention and the right to opt-out of a case designated as a Rule 23(b)(3) class action.[6] Third, class actions would become unmanageable and non-productive if each member could individually decide to appeal, thereby defeating the very purpose of class action lawsuits. *See, Croyden*, 969 F.2d 675; *Walker*, 858 F.2d 1071; *Guthrie*, 815 F.2d 626.

II. THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT.

The petition is unsuitable for review by this Court, due to the unique and unusual facts of this case, to wit: petitioners seek to overturn a class settlement which they affirmatively elected to join after being given three opportunities to opt-out; petitioners had, and still have, their own separate lawsuit against defendants (*Taylor*) pending in the Pennsylvania state

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[6] The "opportunity to opt-out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Class members are in an advantageous position because "they [know] the terms of the settlement before having to decide whether to opt out." *Weinberger v. Kendrick*, 698 F.2d 61,72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (in making an opt-out decision, settlement class members "can benefit from the specific knowledge of the amount of recovery they can expect from remaining in the class".).

court; petitioners seek to overturn a class settlement which petitioners characterized to the Pennsylvania state court as one which provided petitioners with substantial, necessary, needed benefits and compensation; petitioners are the only class members seeking to overturn a class settlement which was acceptable to class representatives and all other members of the class.

These foregoing facts should make clear that petitioners have an unstated personal agenda which has nothing to do with the merits of the *Bowling* settlement. Their agenda involves personal financial gain. Petitioners only hope for accomplishing such requires them to continue to delay and disrupt implementation of the *Bowling* settlement through appeal.

III. PETITIONERS' "DUE PROCESS" ARGUMENT IS MERITLESS.

Petitioners argue that dismissal of their appeal violated their constitution right to due process of law. Relying upon 28 U.S.C. Section 1291, petitioners assert that they have a statutory right to appeal regardless of standing. Petitioners' reliance is misguided, for that statute grants appellate jurisdiction to the courts of appeal, not an absolute right to appeal regardless of standing.

Petitioners also assert that they had a right to rely upon pre-*Marino* rulings of the Court of Appeals for the Sixth Circuit on the issue of standing to appeal,[7] and to ignore the Court of Appeals' more recent decisions which hold that non-party class members lack

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[7] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

standing to appeal, due to the fact that the decisions were unpublished.[8] Yet, the Sixth Circuit routinely cites its unpublished decisions as precedent, and Rule 24(c) of the Sixth Circuit permits the citing of unpublished cases of precedential value. Petitioners further allege that the position of the Sixth Circuit is unclear on the issue of standing to appeal, yet the Tenth Circuit found the Sixth Circuit's position to be quite clear and cited to *Police Officers for Equal Rights v. City of Columbus* in *Gottlieb*, 11 F.3d at 1010. These same arguments were presented as well to the Court of Appeals when petitioners requested a rehearing *en banc*, and no member of the Sixth Circuit found petitioners' arguments to be worthy of consideration.[9]

Last, petitioners stated that the district court led them to believe that intervention was unnecessary and that the district court treated them as *de facto* intervenors. There is no support for such an argument. Petitioners were treated as objecting class members, and nothing more. Moreover, petitioners were treated in the exact manner as the district court treated objecting non-class members, and any other

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[8] *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (6th Cir. 1988) (unpublished, text available on LEXIS and WESTLAW); *Thompson v. Kentucky*, 827 F.2d 770 (Table) (6th Cir. 1987) (unpublished, text available on LEXIS and WESTLAW).

[9] Petitioners also argued to the Sixth Circuit that the panel assigned to their appeal was biased against them, and such was evidenced by the fact that the order dismissing their appeal was not designated as an "opinion" to avoid full text publication thereby assuring that the order would receive as little scrutiny as possible from other members of the court. This argument was also nonpersuasive to the Sixth Circuit.

interested individuals or entities, who were permitted to fully participate in the fairness hearing process. The district court never indicated that it considered petitioners to be intervenors, or parties. Assertions to the contrary are simply untrue.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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